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IN THE

Supreme Court of the United States

October Term, 1937.

No. 367.

ERIE RAILROAD COMPANY (a New York corporation),
Petitioner,

against

HARRY J. TOMPKINS,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENT, HARRY J. TOMPKINS.

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> "* * * as the Conn and Kolich cases show an alleged permissive way parallel to the plaintiff's tracks and on its right of way, as distinguished from a crossing over them, is not recognized in this State."

The *Conn* and *Kolich* cases are above set forth and clearly stand for no such proposition. In the *Conn* case, no beaten path was established.[1] In the *Kolich* case, the accident happened on a cross-path and the sole issue was plaintiff's contributory negligence.[2]

The authority of the *Falchetti* case is further weakened since peculiar facts were there involved. In that case plaintiff was struck by the overhang of an engine. At the time he was struck he was on a path parallel to defendant's railroad track at a sharp curve. The Court pointed out that even in the exercise of due care the engineer could not tell whether his overhang would hit anyone on the path. Said the Court (p. 206):

> "It is difficult, if not impossible, for the engineer of an approaching train on the track nearest the path to know, until it is too late to avoid an accident, whether or not he can operate his engine without striking a pedestrian, if one should be on the path at the place of this regrettable accident. At that point it was but a few inches from the track, so that the cylinder of the engine, on account of the curve, not only projected over the rail further than would have been the case on a straight track, but also by means hereof, tended to hide from the view of the engineer those who were on the path."

2. The facts of the case at bar do not come within the purview of the Pennsylvania decision.

The record discloses and the Circuit Court of Appeals affirmed the fact that at the time plaintiff was struck he was at the junction of two paths (fols. 141, 276; Circuit Court of Appeals Opinion, fol. 496), one crossing the track and one running parallel thereto (fols. 111-114; Circuit Court of Ap-

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[1] See *supra*, page 20.

[2] See *supra*, page 21.

peals, fol. 496). It will be noted that the Pennsylvania decision on which petitioner relies states only that no duty of due care is owed to persons on longitudinal paths but specifically confines the decision to such paths as distinguished from cross-paths.[1] Under the law of Pennsylvania, it is clearly established that a duty of due care *is* owed to persons on cross-paths (*Lodge* v. *Pitts etc. R. Co.*, 243 Pa. 10, 89 A. 790; *Steele* v. *Lake Shore etc. R. Co.*, 238 Pa. 295, 86 A. 201; see footnote, p. 18 of petitioner's brief). It would, therefore, appear that the Pennsylvania decision of *Falchetti* v. *Pa. R. R.* is inapplicable to the facts of the case at bar[2] since at the time plaintiff was struck he was on the cross-path. At trial, defendant claimed no duty of due care whatsoever was owed to plaintiff, asserting that no permissive pathway doctrine could be applied to this case (defendant's objection, fols. 123-124; defendant's motion, fol. 640; defendant's assignment of error, fol. 1453).

On appeal, defendant, in order to sustain its position at trial contended that the cross-path had nothing to do with the case at bar. Now defendant concedes that it was a "disputed" question of fact[3] as to whether plaintiff was on the cross-path. This Court will refuse to entertain certiorari where disputed questions of fact are involved.

D. There is no conflict among the Circuits upon the question here involved.

Petitioner contends there is a conflict in the Circuits on the question involved. Since clear Supreme Court holdings are determinative of the issues involved, any conflict in the Circuits necessarily becomes irrelevant. The cases cited in subdivision B of this point clearly indicate, however, that whenever the point has been squarely raised (except in the First Circuit) the Circuits have unanimously followed Supreme Court rulings.[4] IN NONE OF THE CASES OUTSIDE OF THE FIRST

[1] Relevant quotation from said decision, *Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 160 A. 859, may be found at page 22.

[2] Defendant's assignment of errors, fol. 1453.

[3] Petitioner's brief, page 6.

[4] See *supra*, pages 9, 10, 11, 12.

CIRCUIT CITED BY PETITIONER WAS THE QUESTION OF GENERAL-LOCAL LAW RAISED EXCEPT in *Roberts* v. *Tennessee Coal etc. Co.*, 255 Fed. 469, and in *McGuire* v. *Sherwin-Williams Co.*, 87 Fed. (2d) 112. In the latter case, although the Court stated that in the case at bar it (p. 114) "was not bound to follow the decisions of the highest court of the state," "no impelling reason" existed for disregarding the state decisions since there was a square split of authority on the point involved.

It is interesting to note that the case upon which petitioner mainly relies as creating such a diversity among the Circuits as to warrant certiorari, *B. & M. R. R.* v. *Breslin*, 80 Fed. (2d) 749 (C. C. A., 1st), was a case where certiorari was denied by the Supreme Court on March 2, 1936 (297 U. S. 715), EVEN THOUGH AT THE TIME OF ITS RENDITION THERE WAS A DECISION IN ANOTHER CIRCUIT DIRECTLY CONTRARY TO IT (*Snare & Triest Co.* v. *Friedman*, 169 Fed. 1, cert. den. 214 U. S. 518—involving the same doctrine, attractive nuisance aspect of railroad turntable, and holding general rather than local law applicable).

II. The lower Court properly applied the rule that where reasonable men may differ contributory negligence is a question for the jury.

In spite of a feeble protest by petitioner, it cannot be denied that the lower Courts followed the simple and well-established rule that where reasonable men may differ the question of contributory negligence is for the jury.

The Circuit Court of Appeals opinion reads as follows (fol. 498):

> "Nor can we say, in view of the cases, that the possibility of being hit by some unusual projection from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it (citing several cases). To us it would seem imprudent to walk or even stand in the dark within a foot of a train moving at 10 miles an hour; but the fact that recoveries have been allowed under

closely similar circumstances in the cases above cited *indicates that fair minded men may hold a different view. This is enough to preclude taking the issue from the jury*" (citing cases). (Writer's emphasis.)

The italicized portions of the above quotation clearly indicates that the Circuit Court of Appeals applied the correct test as recognized by this Court and conceded by petitioner.[1]

Petitioner raises the objection that the lower Court should not have looked to the decisions of other Courts in order to determine whether this plaintiff was guilty of contributory negligence. Unless we are to assume that other verdicts were not rendered by fair-minded men and passed upon by fair-minded jurists, and unless we are to abolish the entire system of precedent upon which our judicial foundation is constructed, the petitioner's argument is untenable.

The American Law Institute Restatement of the Law of Torts, at Section 285, Topic 3, recognizes that the conduct of a plaintiff may be defined by a decision, or series of decisions, in closely similar cases and that such decisions are controlling.

Nor can any alleged difference in inches (if any there appears from the extended testimony) between the instant case and those cited by the Circuit Court of Appeals[2] be said to be of such moment as to warrant certiorari.

It is to be noted, of course, that the Circuit Court of Appeals did not rely solely on the cases cited therein in reaching its determination of the instant case, although a reading of petitioner's brief would lead one to so believe. The Circuit Court of Appeals opinion reads (fol. 498):

"In the case at bar, the opportunity to avoid danger was easily available and the danger was very

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1 Pages 33, 34 of petitioner's brief.

2 The cases cited were cases in which plaintiff was so close to the edge of a station platform as to be thrown down by the suction of a swiftly passing train (*Munroe* v. *Penn. R. Co.*, 85 N. J. L. 688, 90 A. 254); where plaintiff was about two or three feet from a moving train (*Texas & Pacific* v. *Greene*, 291 S. W. 929, aff'd 299 S. W. 639); where plaintiff was about 2½ to 3 feet from a moving train (*Chesapeake & O. R.* v. *Davis*, 22 Ky. L. Rep. 748, 58 S. W. 698); where plaintiff was three or four feet from a moving train (*Pruitt* v. *Sou. R.*, 167 N. C. 246, 83 S. E. 350); where plaintiff was within five feet from a moving train (*Schultz* v. *Erie R.*, 46 Fed. [2] 485).

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Petitioner,
against
HARRY J. TOMPKINS,
Respondent.
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On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF ON BEHALF OF RESPONDENT, HARRY J. TOMPKINS.

Statement of Facts.

On July 27, 1934, respondent, twenty-seven years of age, suffered the loss of his entire right arm (p. 86). The accident which forms the basis of respondent's cause of action occurred just as he was at the junction of two footpaths (pp. 30, 71, 72, 78; Opinion, Circuit Court of Appeals, p. 497) which had been used for decades by his townspeople and himself (pp. 21-27, 83, 107, 114). One of these paths crossed defendant's railroad tracks diagonally and the other ran near the side of defendant's tracks and parallel therewith (pp. 21-27). One night, when returning from his

mother-in-law's, he took the parallel path to the junction, thence intending to proceed along the diagonal path away from the tracks (pp. 29-30). This was the shortest and most direct route to his home (pp. 60, 353, Blue Print, Plaintiff's Exhibit 1), which was the second house from the tracks (p. 19). On the night in question, as he was walking along the parallel path, a train approached from the opposite direction (p. 30). Hundreds of his townsfolk, as well as the plaintiff, were in the custom of walking along this path at all hours of the day and night while trains were passing (pp. 40, 125-127). Many of them had even wheeled barrows of coal along the path while trains were passing (p. 127). He, therefore, had no reason to anticipate danger (pp. 40, 41).

He was but a few steps from the junction of the two paths (p. 30) when he saw the side of the engine as it passed him (p. 42). He continued to walk and took about four steps while parallel to the train (p. 71). This brought him to the junction of the two paths (p. 71). At that moment as the engine and a few cars of the train had passed him (p. 50) and at that time and place just as he had reached the junction (p. 30) there suddenly loomed up in front of him a large black object protruding from the side of the train out over the footpath (pp. 30, 78). In the brief moment before plaintiff was thrown violently backward and under the cars, he was able to judge that he was hit by "a black object that looked like a door" (p. 30). It was later developed at trial that the fourth car on the seal-check list produced at the trial by defendant (Defendant's Exhibit E, p. 374) was a refrigerator car of the type of which the doors swing outward (pp. 290, 239).

As to the alleged negligence of the plaintiff:

One fact must be regarded as vitally significant. Respondent was struck by a door protruding from the train (p. 30). He was not struck by the side of the train (p. 78). The Trial Judge charged the jury, at defendant's request, that

if they believed "plaintiff was not struck by the door of a freight car * * *" (p. 350), then its verdict must be for the defendant. By virtue of the verdict for the plaintiff (p. 352) it is to be assumed that the plaintiff was struck by the door of a car, a danger he had no reason to "anticipate" (p. 397, Opinion, Circuit Court of Appeals). Therefore, the mass of mathematical data compiled in appellant's brief (Appellant's Brief, p. 5) designed to demonstrate plaintiff's proximity to the side of the train becomes irrelevant.

Concerning the defendant's mathematical data:

It is to be noted that appellant has entirely ignored the testimony in stating the facts. Plaintiff testified that he was struck at the junction of the two paths (p. 30); that at this point the two paths widen out to about 4 feet and the pathway space was 2 to 2½ feet from the ties (pp. 26, 157). Under elementary appellate procedure, not only are these facts to be considered as true, but the most favorable inferences that can be drawn in favor of plaintiff must be assumed. Instead, however, appellant has given the measurements of the path at points other than where plaintiff was struck and based invalid arguments thereon (Appellant's Brief, p. 5). It has entirely omitted to mention the measurements at the point where plaintiff was struck.

These distances were only the estimates of plaintiff's witnesses and were not offered as exact measurements. They should be blended with the information that this well-defined path (p. 21) was safely used at all hours while trains were passing.

The defendant produced exact measurements by experts as to the width of the railroad ties (p. 218), the engine (p. 220) and the cars of the train in question (p. 216). The defendant also produced a surveyor, who gave accurate measurements as to the slope and character of the terrain immediately adjacent to the footpath and tracks (pp. 269-276; Defendant's Exhibit I, p. 379). He admitted the existence of paths (p. 279). However, the defendant offered

no testimony, accurate or estimated, as to the path, its distance from the tracks or the distance between a pedestrian on the path and a passing train. The fair conclusion is that the estimated distances of plaintiff's witnesses were more favorable to the defendant than revealed by the accurate investigation of defendant.

The appellant in its brief (Appellant's Brief, p. 6) attempts to attack plaintiff's credibility, which is not at all one of the issues here involved. The plaintiff testified he was struck by "a black object that looked like a door" (p. 30) which he knew projected from the side of defendant's train (p. 51). He was not willing to swear positively that the projection was a door, although he believed it to be one (p. 73); and he told this to Drs. Murphy and Fleming when he was in the hospital (pp. 77, 78), immediately after the accident, before he had seen a lawyer and before he had signed the bill of discovery (p. 79). This bill of discovery was prepared by plaintiff's attorney in order to obtain information for a bill of particulars sought by defendant and in the main coincided with plaintiff's testimony at the trial.

Defendant's witnesses, on the other hand, clearly attempted to conceal the true order of the cars on the train. The seal-check list (Defendant's Exhibit E, p. 374) read differently from the train list (Defendant's Exhibit F, p. 375); the wheel-book (Plaintiff's Exhibit 7, p. 359) read differently from the former two. Two cars, which were not even mentioned in these three lists, were shown to have blood stains on their wheels after arrival at their destination (p. 255). An alleged inspection of the train in question, before it departed, was attempted to be proved in the case of one witness by a report which he conceded he made up after he knew of the accident (p. 259) and in the case of another witness by independent recollection of the inspection which occurred back in 1934, although he had kept no record (p. 268). It appears that on defendant's railroad the car inspectors never tested the seals on doors to see that the doors were securely locked (pp. 305, 304, 258, 267). Two other witnesses were produced by defendant who were under no

duty to make any inspection (pp. 281-297, 311). Their only duty was to prepare the order and description of the train (pp. 281, 311). These witnesses only inspected one side of the train, conveniently the side from which the projection protruded (pp. 283, 296, 297). Their testimony regarding the alleged safety of the train in every respect on the night in question in 1934 can hardly, therefore, be called credible.

An inspection of the train was made after the accident and records were kept by defendant (pp. 253, 254). In spite of this fact, defendant offered as its sole witness to this latter inspection a person who had inspected only part of the train (pp. 252-254). Defendant concealed the number of cars inspected by him as well as the condition of the balance of the train (pp. 252-254). It is a fair inference that said concealed information was detrimental to appellant's cause.

ARGUMENT.

I. The lower Court was correct in applying the rule of the great weight of authority since

A. In cases involving questions of general law, Federal Courts will exercise their independent judgment.

This doctrine, which is now elementary, found its inception in *Swift* v. *Tyson,* 16 Peters 1; has constantly been reaffirmed by the Supreme Court and was most recently applied in the case of *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.,* 276 U. S. 518.

B. Decisions of this Court, as well as logic and reason, have established that questions of the type here presented, involving railroad accidents, are questions of general law, upon which independent judgment may be exercised by Federal Courts.

Decisions of this Court involving railroad accidents or closely analogous questions in which it has been held that

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With equal appropriateness it may be stated here, must the rights, obligations and duties subsisting between the railroad and pedestrian change at every State line?

The contention of appellant (Appellant's Brief, p. 43) that the instant case is closely analogous to *Detroit* v. *Osborne,* 135 U. S. 492, is clearly belied by the following quotation. That case dealt with a problem of municipal government. After showing that Michigan *statutes,* as interpreted by State Court decisions, exempted the defendant municipality from liability to plaintiff for defective sidewalk, the Court said (p. 498):

> "The question is not new in this court. In the case of Clairbourne County v. Brooks, 111 U. S. 400, 410, it was held that, 'When the settled decisions of the highest court of a state have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States'; and in the opinion it was observed: 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body public of the State.'
>
> What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation."

The Courts below, in rejecting the single, illogical decision of the Pennsylvania Court, chose to follow the rule not only supported by authority, but also by logic and justice. In the briefs below, decisions were compiled by respondent, illustrating that in practically every jurisdiction where the question has arisen the Courts have decided that persons upon *all* types of beaten pathways on railroad property are owed a duty of care by said railroads. (Decisions were collected from close to thirty jurisdictions and the great weight of authority was conceded by appellant to support the rule.)

This overwhelming authority bases its position upon the cogent reason that since persons are likely to be upon such beaten paths at the time of passage of railroad trains, injuries to such persons are likely to result unless the railroad is operated with due regard for the safety of the individuals so situated, and this is true whether the path crosses the railroad tracks or runs parallel thereto (*Adams* v. *Southern R.*, 84 Fed. 596, 600). It is to be further noted that this rule is not oppressive on railroads since it is confined to well beaten and well defined pathways (*Adams* v. *Southern R.*, 84 Fed. 596, 600),* and it certainly is within the province of railroads to protest such user and discontinue the same if it so desires. Surely it should be in the power of a Federal Court, if it so chooses, to adopt the more logical and humane rule of the majority opinions. That the Federal and State Courts operate under separate and distinct sovereignty is a fundamental concept in our government. The ultimate aim of both is justice, and where a State Court has gone astray, to compel Federal adhesion to such injustice is not only to destroy the judicial function but to make a fetich of legalistic conflicts principles.

Let the Federal Courts exercise their own judgment on all principles of general law, except where local rules of property, involving such things as transfer of title upon which people have relied for generations, or except where peculiar local customs, such as, e. g., prohibition of riding on Sunday, have grown up. How much clearer does the "local law" exception to the rule become when analyzed in this light, an exception designed only to prevent the upsetting of vested local rights and undue interference with provincial customs and ways, by Federal Courts.

Authority, logic and reason, therefore, impelled Federal Courts in this case to exercise their independent judgment.

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*See also *Tiers* v. *Pa. R. Co.*, 292 Pa. 522, 141 Atl. 487; *Conn.* v. *Pa. R. Co.*, 288 Pa. 494, 136 Atl. 779; quotations contained *infra* (p. 22).

C. There is no such doctrine as contended by appellant, that where a rule is well established in a State, the question is one of local law and Federal Courts must follow the rule even though the rule might otherwise be regarded as one of general law.

Appellant contends (Point III, subd. "B," Appellant's Brief) that where a rule is well established in a State, whose law would ordinarily be applicable under conflicts principles, Federal Courts are bound to follow the same, even though the rule might be regarded as one of general law.

It must be noted at the outset that so far as the instant case is concerned there is no well established State rule. There is but a solitary Pennsylvania decision in point, decided in 1932, and clearly contrary to other Pennsylvania decisions.*

But even if Pennsylvania decisions were well established on the issues, petitioner's contention is based upon a superstructure of authority so tenuous that it cannot even be called *"obiter dicta."* It is at most *inference* from *"obiter dicta."* This Court has clearly defined those situations under which it will follow State law and those under which it will use its independent judgment in following the weight of authority. Quotations from this Court on the subject have been previously set forth in full, *supra,* at pages 9 to 11; and see also pages 25, 26. From none of these quotations does it appear that this Court will follow a State rule, even if the rule is well established, where the case involves an issue of general law.

Appellant's brief entirely disregards the aforesaid clear enunciations by this Court and delving into hidden crevices of its judicial opinions draws inference upon inference concluding with what "we think" this Court means.

Such conduct on appellant's part would indeed be justifiable, if it could by some means show that this Court in spite of its clear words as above enunciated *has acted* in a way inconsistent with its clear statements above set forth.

**Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 Atl. 859, analyzed in Point II of this brief.

This, however, appellant is unable to do. Every case cited by appellant on this point was a case where the Court held that State Court rulings were rightfully disregarded.* Those decisions cannot possibly demonstrate that this Court *has acted* in such a way as to provide a basis for appellant's contention that there is a rule that State decisions in questions of general law will be followed, where a State rule is well established.

The single case cited by appellant in which this Court did follow the local law was *Bucher* v. *Cheshire Road Co.*, 125 U. S. 55, which involved the local interpretation of a

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*Cases cited by petitioner are as follows:

Swift v. *Tyson*, 16 Peters 1 (p. 24 of Appellant's Brief). General law applied in preference to contrary local rulings on question of negtoiable instruments.

Black & White Taxicab Co. v. *Brown & Yellow Taxi Co.*, 276 U. S. 518 (p. 34 of Appellant's Brief). General law applied in preference to contrary local rulings on question of right to give exclusive soliciting privileges on railroad property.

Carpenter v. *Providence Washington Ins. Co.*, 16 Peters 495 (p. 29 of Appellant's Brief). Construction of insurance policy deemed to be a question of general law.

Lane v. *Vick*, 3 How. 464 (p. 30 of Appellant's Brief). Construction of will held to be question of general law and local decision disregarded.

Chicago v. *Robbins*, 67 U. S. 418 (p. 30 of Appellant's Brief). Negligence of landowner in Chicago held to be a question of general law and local decisions disregarded.

Yates v. *Milwaukee*, 10 Wall. 497 (p. 31 of Appellant's Brief). Holding that question of what constitutes a dedication of land to public use is a question of general law; local decision ignored and contrary general rule applied.

New York Central R. R. v. *Lockwood*, 17 Wall. 357 (p. 31 of Appellant's Brief). Ability of carrier to limit its liability for injury to passenger held a question of general law.

Burgess v. *Seligman*, 107 U. S. 20 (p. 31 of Appellant's Brief). Two local decisions squarely in point on question of liability of pledgee of corporate stock for debts of corporation disregarded and general law applied.

Baltimore & Ohio R. v. *Baugh*, 149 U. S. 368 (p. 32 of Appellant's Brief). General law applied in preference to contrary local holdings on question of fellow-servant rule.

Barber v. *Pittsburgh etc. R.*, 166 U. S. 83 (p. 33 of Appellant's Brief). General law applied in preference to contrary State decision on question of construction of a devise of land within said State.

Kuhn v. *Fairmont Coal Co.*, 215 U. S. 349 (p. 33 of Appellant's Brief). Local decision disregarded and general law applied on question of implied obligation to support surface in lease of subsurface mining rights.

Snare & Triest Co. v. *Friedman*, 169 Fed. 1; cert. den., 214 U. S. 518 (p. 36 of Appellant's Brief). Federal rule in turntable case applied in preference to decisions of State where accident occurred.

purely local statute prohibitng traveling on Sunday. The case, therefore, clearly involved a local issue and could be no possible authority to the effect that Federal Courts will follow well established State decisions on questions of general law.

It appears that this Court has acted in just such situations as those wherein appellant contends the State Courts will be followed. But whereas appellant is unable to offer a single decision in its favor, the following *holdings* are set forth to demonstrate that *even* where State decisions are well established the Federal Court may rightfully disregard State rulings, if the subject-matter is general rather than local in nature.

In *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, the Ohio rule was so well established that the highest Court of Ohio stated that, even though they disagreed with its wisdom, the rule would "doubtless be accepted as authoritative." Yet the Federal Court disregarded the Ohio rulings and followed the weight of authority throughout the country, stating that the *subject-matter* was one on which the general or common law would be applied.*

The latest pronouncement of the Supreme Court on this subject, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, also belies the theory advanced by petitioner. There, although it had been settled for thirty-five years in Kentucky that a railroad had no authority to grant exclusive soliciting privileges at its stations to taxi companies, the Kentucky rule was disregarded and the weight of authority to the effect that such licenses were valid was followed. (The license and place of performance were in Kentucky.) The Court stated that the *subject-matter* involved was one on which Federal Courts were not bound by State decision.†

The assertion in appellant's brief (p. 35) that "the question at issue had not been foreclosed or settled by previous

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* Relevant quotation may be found at page 6.
† Relevant quotation may be found at page 9.

Kentucky adjudications" is clearly untrue, for as Mr. Justice Holmes remarked in his dissenting opinion (p. 535):

> "This is a question concerning the lawful use of land in Kentucky by a corporation chartered by Kentucky. The policy of Kentucky with regard to it has been settled in Kentucky for more than 35 years."

In the case of *Central Vermont Ry.* v. *White*, 238 U. S. 507, the Supreme Court again refused to follow a long established State ruling that the burden of proving contributory negligence was upon the plaintiff even though it considered the question one of substance.* In the following cases clear and unequivocal rulings by State Courts which would have governed under principles of conflicts were ignored in favor of majority rulings. In none of them does the degree to which State law is settled concern the Court. The essential determinative factor is that a question of general law was involved:

Chicago v. *Robbins*, 67 U. S. (2 Black) 418. (Rule on liability in negligence of owner of land for acts of independent contractor.)

N. Y. C. R. R. v. *Lockwood*, 17 Wall. 357. (Rule on ability of railroad to contract itself free of liability for negligence.)

Myrick v. *Michigan Central R. R. Co.*, 107 U. S. 102. (Rule on liability of a railroad for safe delivery beyond its own line.)

Olcott v. *The Supervisors*, 16 Wall. 678. (Rule on power of a county to tax in aid of construction of a railroad.)

Beutler v. *Grand Trunk Ry.*, 224 U. S. 85. (Fellow-servant rule.)

Appellant itself points out that in the case of *Swift* v. *Tyson*, 16 Peters 1, this Court would not even have gone into the question of whether Federal Courts may disregard

* Relevant quotation may be found at pages 6, 7.

Federal Courts may exercise their independent judgment are as follows:

Baltimore & Ohio R. R. v. *Baugh,* 149 U. S. 368.

That case involved a railroad accident which occurred in Ohio. Under a well-established line of decisions in Ohio the fellow-servant rule was inapplicable to the case. Under the decisions of Federal and other State Courts the fellow-servant rule applied. This Court held the fellow-servant rule applicable, saying (p. 370):

> "* * * unvarying has been the course of decision that the question of responsibility of a railroad corporation for injuries caused to or by its servant is one of general law.
>
> "This is not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, and in which the suit was brought, but rather one of general law to be determined by a reference to all the authorities, and a consideration of the principles underlying the relation of master and servant."

Chicago v. *Robbins,* 67 U. S. (2 Black) 418. (General law rule applied in preference to contrary local law rule on question of liability of land owner to a passerby for injuries sustained due to unguarded excavation on property.)

This Court held (p. 428):

> "It was urged at the bar that this court, in such cases, follows the decisions of the local courts.
>
> "Where rules of property in a state are fully settled by a series of adjudications, this court adopts the decisions of the State courts. But where private rights are to be determined by the application of common law rules alone, this court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions."

Central Vermont Ry. v. *White,* 238 U. S. 507. (Question of burden of proof of contributory negligence.)

Said this Court (p. 512):

> "But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The Federal Courts have enforced the principle even in trials in States which hold that the burden is on the plaintiff." (Citing cases.)
>
> *Gardner* v. *Michigan Central Railroad,* 150 U. S. 349. (General law rule applied in preference to contrary local law rule on question of due care owed to plaintiff, injured due to hole in planking of defendant railway.)
>
> *Hough* v. *Railway Co.,* 100 U. S. 213. (General law rule applied in preference to contrary local law rule on question of contributory negligence of plaintiff in continuing to work after notice of defect in defendant's railroad equipment.)

This Court held (p. 226):

> "The question before us, in the absence of statutory regulations by the State in which the cause of action arose, depends upon principles of general law, and in their determination we are not required to follow the decisions of the State Courts."
>
> *Lake Shore etc. Ry.* v. *Prentice,* 147 U. S. 101. (General law rule applied in preference to contrary local law rule on question of liability of railroad for punitive damages for acts of agent toward passenger.)
>
> *New York Central Railroad Co.* v. *Lockwood,* 17 Wall. 357. (General law rule applied in preference to contrary local law rule on question of the ability of a carrier to limit its liability for injury to a passenger.)

This Court stated (p. 368):

> "We should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves and resting upon what we consider sound principles of law."

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397. (General law rule applied in preference to contrary local law rule on question of ability of carrier to limit its liability for injury to goods.)

Defendant there argued that the law of New York, where contract made, controlled and was settled by recent decisions. This Court stated (p. 423), per Gray, J.:

> "But on this subject as on any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the Courts of the State and will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties in an action at law of which the Courts of the State have concurrent jurisdiction and upon a contract made and to be performed within the State."

Beutler v. *Grand Trunk Railway*, 224 U. S. 85. (General law rule applied in preference to contrary local law rule on question of applicability of fellow-servant rule.)

This Court said (p. 87):

> "* * * So it has been decided that in cases tried in the United States Courts that we must follow our own understanding of the common law when no settled rule of property intervenes."

See also:

Baltimore & Ohio R. v. *Goodman*, 275 U. S. 266. (Federal "Stop, Look & Listen" rule applied to railroad crossing accident cases although no such rule in State where accident occurred.)

Prokora v. *New York Central R.*, 292 U. S. 98. (Modifying Federal "Stop, Look & Listen" rule.)

Union Pac. R. v. *McDonald*, 152 U. S. 262.

Sioux City & P. R. Co. v. *Stout*, 17 Wall. 657. (Federal doctrine on liability of railroad for injuries to infant on turntables, on theory of attractive nuisance applied in both above cases without consideration of State law on subject.)

Chesapeake & Ohio R. v. *Kuhn*, 284 U. S. 44. (Holding in negligence cases arising under Federal Employees' Liability Act "federal common law" must be followed in preference to contrary state decisions.)

The foregoing array of authorities prompted Judge Learned Hand, in *Cole* v. *Pennsylvania R. R.*, 43 Fed. (2d) 953 (involving the New York rule on the spreading of fires by railroads), to hold:

> "It is evident from the foregoing that the most recent decisions of the Supreme Court, as well as a long line of authorities in back of it, recognize a wide field of general jurisprudence in which the Federal Courts decide cases according to their independent judgment. In this field actions involving the liability of railroads have undoubtedly been conspicuous."

The above citations have been confined to railroad accidents or closely analogous situations. In addition it should be noted that this Court on numerous occasions has clearly enunciated the sort of questions which it deems to be questions of local and those which it deems to be questions of general law. A reading of the following quotations will reveal that the legal issue here involved is not of a local nature.

Said this Court in *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, in holding that the issue there involved was not one of a local nature (p. 529):

> "There is no question concerning *title to land*. No provision of *State statute* or *constitution* and *no*

> *ancient* or *fixed local usage is involved.* For the discovery of common law principles applicable to any case investigation is not limited to the decisions of the Courts of the State in which the certiorari arose." (Writer's emphasis.)

The holding of *Olcott* v. *The Supervisors,* 16 Wall. 678, is equally appropriate (p. 689):

> "It is undoubtedly true in general that this Court does follow the decisions of the highest court of the states respecting local questions *peculiar to themselves,* or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions on local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments." (Writer's emphasis.)

Swift v. *Tyson,* 16 Peters 1, the progenitor of the rule, likewise contains a clear statement of the rule (p. 18):

> "In all the various cases, which have hitherto come before us for decision, this Court has uniformly supposed, that the true interpretation of the 34th Section limited its application to State laws strictly local, that is to say to the positive statutes of the State, and the construction thereof, adopted by the local Tribunals, and to rights and titles to things, having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the Section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law * * *."

In *Bucher* v. *Cheshire Rd. Co.*, 125 U. S. 555, the Court specifically addressed itself to what is meant by local law (p. 582):

> (After stating that Federal Courts will follow State Courts in questions which concern the Constitution and laws of the State, the Court continued):
> "It is also well settled that where a course of decisions, whether founded upon statute or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer or sale of property and the rules which affect the title or possession thereto, they are to be treated as the laws of that State by the Federal Courts."

See also, quotations, *infra*, pp. 25, 26.

There is not involved here any "title to land," "ancient or fixed local usage," "State statutes" or "Constitution."

Nor is there involved here a question, "peculiar to" the State of Pennsylvania. This Court will judicially notice that railroads extend into every State of the Union, and the same problems of railroad accidents and injuries to persons on beaten paths exist throughout the land. One has but to consult the numberless cases dealing with such accidents which are reported in every jurisdiction to see the national scope of the problem involved.

In the case at bar, not only were the Courts below supported by the great weight of authority above recited, but every dictate of practicality, logic and reason compelled the application of the general law rule.

The same practical reason which influenced the decision of *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, is present here. Here, as in the *Baugh* case, we have a railroad extending over many State lines. The employee there involved, like the pedestrian here involved, was located exclusively in one State.* The Court said:

> "As it (the railroad) passes from State to State must the rights, obligations and duties subsisting between it and its employees change at every State line."

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* He worked in and out of the town of Bellaire, Ohio.

In *Barber* v. *Pittsburgh* (166 U. S. 83) this Court refused to follow a single State decision relating to the construction of a certain form of devise in a will. Said this Court (p. 99):

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the Courts of the United States in determining the title to land within the State, whether between the same or other parties (citing cases).
>
> "But a single decision of the highest court of a State upon the construction of the words of a particular devise is not conclusive evidence of the law of the State in a case in a court of the United States, involving the construction of the same or like words, between other parties or a case between the same parties or their privies unless presented under such circumstances as to be an adjudication of their rights (citing cases)."

Likewise in accord is *Lane* v. *Vick,* 44 U. S. (3 How.) 464. In that case this Court refused to follow the decision of the highest Court of the State of Mississippi on the construction of a devise in a particular will, stating at page 476:

> "It is insisted that the construction of this will has been conclusively settled by the Supreme Court of Mississippi in the case of Vick, et al. v. The Mayor, etc., of Vicksburg, 1 How. 379,"

and after indicating that that case was not *res adjudicata,* the opinion continues:

> "With the greatest respect, it may be proper to say this Court does not follow the State Courts in their construction of a will or any other instrument as they do in the construction of statutes. Where * * * the construction of a will had been settled by the highest Courts of the State and had long been acquiesced in as a rule of property this Court would follow it, because it had become a rule of property."

See also *Yates* v. *Milwaukee,* 77 U. S. (10 Wall.) 497.

A case very close to the case at bar was *Pease* v. *Peck*, 18 How. 595. In that case a late Michigan decision was contrary to a series of earlier Michigan decisions on the question of a Statute of Limitations. In refusing to follow the later decision this Court stated (p. 599):

> "Where the decisions of a State Court are not consistent we do not feel bound to follow the last if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedents."

In addition to the aforementioned authorities this Court has explicitly stated that where the law of a State is not settled, even though the Federal Court would otherwise be under a duty to follow local law, under such circumstances they may use their independent judgment.

In view of the obvious reliance in the *Falchetti* case on previous precedent in Pennsylvania, and the total failure of said precedent to support the holding in the *Falchetti* case, the law of Pennsylvania can hardly be said to be "settled" against the respondent on the subject here involved.

In *Burgess* v. *Seligman*, 107 U. S. 20, where this Court declared that it was stating its "views with distinction in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions" (p. 34), the following appears (p. 33):

> "Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State and have all the effect of law and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and Statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is. But where the law has not been settled, it is the right and

> duty of the Federal Courts to exercise their own judgment, as they *also always* do in reference to the doctrines of commercial law and general jurisprudence." (Writer's emphasis.)

Again, this Court reaffirmed the rule in *Kuhn* v. *Fairmount Coal Co.*, 215 U. S. 349 (p. 360):

> "We take it then that it is no longer to be questioned that Federal Courts in determining cases before them are to be guided by the following rules: 1. When administering state laws and determining rights accruing under the laws, the jurisdiction of the Federal Courts is an independent one, not subordinate to but coordinate and concurrent with the jurisdiction of the State Courts. 2. Where, *before the rights of the parties have accrued,* certain rules relating to real estate have been so established by State decisions as to become rules of property and action in the State, these rules are accepted by the Federal Court as authoritative decisions of the Law of the State. 3. *But where the State law has not been then settled,* it is not only the right but the duty of the Federal Court to exercise its independent judgment as it also always does when the case before it depends on the doctrines of commercial law and general jurisprudence * * *." (Writer's emphasis.)

See also:

> *Swift* v. *Tyson,* 16 Peters 1;
> *Hines, Trustee,* v. *Martin,* 268 U. S. 458, 465.

It, therefore, appears that, even if a question of local law were here involved, the Federal Court in the case at bar was perfectly justified in exercising its independent judgment, in view of the unsettled condition of the Pennsylvania law and the fact that appellant relies upon a solitary Pennsylvania decision clearly contrary to the weight of Pennsylvania decisions.

Aside from such consideration, however, even if the Federal Court were to attempt to apply the *Falchetti* case to the case at bar, the latter case is inapplicable to the facts

involved herein. It is uncontested in the case at bar that plaintiff was at the intersection of a diagonal and a longitudinal pathway when he was struck. This was affirmed by the Circuit Court of Appeals and by defendant's own counsel (p. 79; Plaintiff's Exhibit 1, p. 353; Opinion, Circuit Court of Appeals, p. 394). Defendant offered no witness to dispute the fact, although an agent of the railroad (in court) had been shown the exact spot where plaintiff was found (pp. 116, 100). The assertion in appellant's brief (p. 13) that the Trial Court "treated the accident as a longitudinal pathway accident" is incorrect. The Trial Court after its charge to the jury refused as already "covered" plaintiff's request to charge (p. 341) that if the jury believed plaintiff was on the junction of the two paths at the time of the accident, the defendant owed him a duty of reasonable care.

A complete reading of the Court's charge in the light of this later ruling reveals that the Trial Court did recognize plaintiff's presence on the diagonal path at the time of the accident. The *Falchetti* case only states that no duty of due care is owed to persons upon longitudinal pathways and clearly does not attempt to reverse or modify the previous well-established Pennsylvania ruling that a duty of due care is owed to persons on cross paths.* Appellant contends that the cross-path doctrine is inapplicable to the facts of the case at bar because the plaintiff was not using the aforementioned diagonal path for the purpose of crossing the railroad track. However, a reading of the Pennsylvania decisions herein set forth† indicates that the liability of a railroad for injury to persons upon cross paths is based not upon the manner of use of such paths but rather upon the likelihood of persons being present in the vicinity of the railroad track where such paths may be situated.

Thus, reviewing the picture as a whole, appellant relies upon a single State decision, recently decided, clearly contrary to the weight of other decisions within the same State

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* See quotation *supra*, page 21.
† See quotations at pages 19, 20.

and itself of highly dubious applicability to the facts of the case at bar. Under such circumstances, even if a local issue had been here involved, the Federal Court was justified in exercising its independent judgment.

III. The lower Courts properly held that it was a question for the jury as to whether plaintiff was under a duty to foresee the danger of an unusual and undesigned projection protruding from the side of defendant's train.

The appellant asserts (Appellant's Brief, p. 46) the Courts below erred "in refusing to hold plaintiff contributorily negligent as a matter of law; and in particular the Circuit Court of Appeals erred in applying an unsound test in reaching this conclusion."

An appraisal of the plaintiff's conduct in the light of all the circumstances at the time of the accident will reveal that the Courts below correctly concluded that the issue of plaintiff's negligence was properly submitted to the jury.

The plaintiff, a young man twenty-seven years of age, having resided in the vicinity of the accident all his life, and within 80 feet of it (Blueprint, Plaintiff's Exhibit 1, p. 353) for the three years prior to the accident (p. 19), knowing that he had safely traversed this path at all hours of the day and night while trains were passing (p. 40); knowing that hundreds of his townsfolk had also safely traversed this path at all hours of the day and night while trains were passing (pp. 125-127); knowing that the terrain immediately adjacent to the said path contained many ruts and was uneven and was on an incline (p. 40); and knowing that the foot path on which he was proceeding was solid and well beaten (p. 39), was walking upon this path on the night of the accident.

He took three or four steps while parallel to the train (p. 71). During this time the engine and several cars of the train safely passed him (p. 50). He kept his body a suffi-

cient distance away from the side of the train so that the overhang of the cylinder head of the engine and all other normal and designed projections from the engine and train safely cleared him by a distance which he estimated in his testimony to be from 1 to 2 feet (p. 44).

When he had reached the junction of the parallel path and the diagonal path, a point (p. 30) where the paths widened out to about 4½ feet (p. 26), and were distant about 2 to 2½ feet from the ends of the ties (pp. 26, 157), a "black object, which looked like a door" suddenly loomed up in front of him (p. 30), struck him on the right side of his head, throwing him backward so that his right arm was severed by the wheels of the passing train.

The undisputed testimony that the plaintiff as well as hundreds of his townsfolk had safely used the paths in question innumerable times prior to the accident, at all hours of the day and night, while trains were passing, is ample proof of the plaintiff's exercise of due care.

In the case of *Harris etc.* v. *Uebelhoer,* 75 N. Y. 169, the Court stated at page 174:

> "So far as prior safe and successful experiments go to negative a negligent frame of mind, in making another, in similar circumstances, it must be conceded that here were sufficient. It cannot be said, as matter of law, that it was negligent and careless, lacking of prudent forethought, to attempt that which others often undertook with safety, and which the party herself had often herself achieved, without harm and without imminent peril."

Furthermore, as pointed out in Points I and II, appellant was under a duty to exercise due care toward the respondent, therefore the latter could proceed on the assumption that appellant would conduct itself in such a manner that he had no reason to believe a freight car door would be open.

Appellant goes to great length to show that in the numerous cases cited by the Circuit Court of Appeals there might have been a difference in inches in the closeness of the plain-

State decisions if it had not first assumed that the question has "been fully settled in New York" (*Swift* v. *Tyson,* 16 Peters 1, at p. 27, footnote 1).

The statement in petitioner's brief (p. 45) that "Even a single decision, if 'clear and unequivocal' and constituting a 'definitive holding' should be recognized as controlling," citing *Hawks* v. *Hamill,* 288 U. S. 52, is very misleading. *Hawks* v. *Hamill* involved a State decision interpreting the State Constitution and this Court merely stated (p. 58):

> "If the single decision interpreting a *constitution* or a *statute* is clear and unequivocal submission to its holding has developed in these days to a practice * * *." (Writer's emphasis.)*

Swift v. *Tyson,* 16 Peters 1, itself stated that a State decision interpreting State statute must be followed by Federal Courts (see quotation *supra,* p. 10).

It thus appears that even though a State rule is well established, Federal Courts are not bound to follow the same where a question of general law is involved.

II. Even if a question of local law were here involved, the same result must be reached since appellant relies upon a solitary Pennsylvania decision, clearly contrary to the weight of Pennsylvania decisions, and of doubtful applicability to the facts of the case at bar.

The case relied on by petitioner (Petitioner's Brief, p. 15), *Falchetti* v. *Penn. R. R.,* 307 Pa. 203, 160 A. 859 (1932) allegedly stands for the proposition that a railroad owes no duty of due care to a person on a well-beaten path parallel to "a railroad's tracks and on its right of way, as distinguished from a permissive crossing over them."

Decisions in Pennsylvania have uniformly held that a duty of care *is* owed to persons on longitudinal paths.

*It will be noted that this doctrine applies only to interpretation of constitutions and State statutes and not to other local matters (see Point II, *infra*).

Many of these cases have been generally characterized in appellant's brief as not so holding. To avoid any misconstruction, the facts and holdings are, therefore, stated in the quoted language of the Pennsylvania courts.

Slamovitz v. *Penn. R. R.*, 266 Pa. 63, 109 A. 544. Plaintiff injured while walking on a "generally used and well beaten path located between the track and the before mentioned concrete wall" (p. 65). "The testimony further showed that, in going into the Kennedy Plant, people generally walked either in the middle of the railroad tracks or on this narrow packed pathway" (p. 66). Held: Duty of "close lookout" required of defendant. Judgment for plaintiff affirmed.

Kremposky v. *Mt. Jessup Coal Co.*, 266 Pa. 568, 109 A. 766. Plaintiff injured on a trestle for coal cars on defendant's private property. "A double track railroad occupied the center of the bridge, on each side of which was a plank walk four or five feet in width. * * * For many years prior to the accident people, both adults and children, had been accustomed to use the walks daily as a short cut" (p. 571). Held: The walks had become permissive ways. Judgment for plaintiff affirmed. "It is the duty of the owner of premises to exercise reasonable care to avoid inflicting injury upon those using a permissive way thereon" (p. 572).

Francis v. *Balt. & O. R. R. Co.*, 247 Pa. 429, 93 A. 490. Discussing certain testimony, as to the admission of which defendant claimed error, the Court said: "This testimony was direct and positive and, if believed, was entirely sufficient to establish not only the fact of the existence of a path *along* and *upon* the ties of the railroad at the point where the accident occurred, but the further fact of its frequent and continuous use by the public for the period above mentioned" (two months) (p. 429). Held: Judgment for plaintiff affirmed. "When the railroad company knew or should have known that part of the tracks through its yard was being used by the public in the way shown by the testimony, except as it interfered and prevented such use, a duty at once attached to exercise a degree of care in

operating its cars thereon corresponding to the increased risk" (p. 429). (This case is characterized in appellant's brief as "essentially a crossing accident"; Appellant's Brief, p. 17.)

Taylor v. *Del. etc. Canal Co.*, 113 Pa. 162, 8 A. 43. Plaintiff injured while on a beaten path which "was used, so far as the testimony shows, by persons not for the purpose of crossing directly across the tracks to reach a point, but for the purpose of going along the track itself, within the right of way of the railroad" (p. 164). This statement of fact is taken from the opinion of the Court of Common Pleas, which statement the Court on appeal adopted as its own (p. 164). Held: "Under the allowance of this permissive way, therefore, the defendant company was bound to use reasonable care" (p. 169). Judgment for defendant reversed.

Kay v. *Penn R. R.*, 65 Pa. 269, 3 Am. Rep. 628. "* * * *along the tracks where the accident happened* a well-worn footpath was plainly visible" (p. 272). Plaintiff was on this path when struck by one of defendant's trains. Held: Nonsuit reversed. The Court said:

> "If, therefore, an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury, without a proper warning of his intent to recall his permission" (p. 273). "* * *. The presumption of a clear track would not reasonably arise if the circumstances were such as have been stated" (p. 274).

It can be seen that the above cases do not rest upon whether paths are longitudinal or crossings but rather on the likelihood of persons being on beaten paths regardless of their route. A reading of the cases dealing with cross-paths, in Pennsylvania, will reveal the same deduction. *Steele* v. *Lake Shore & M. S. Ry. Co.*, 238 Pa. 295, 86 Atl. 201; *Lodge* v. *Pitts etc. R. Co.*, 243 Pa. 10, 89 Atl. 780; see also *Counizzari*

v. *Phil etc. Ry. Co.*, 248 Pa. 474, 94 Atl. 134, and *O'Leary* v. *Pitts etc. R. Co.*, 248 Pa. 4, 93 Atl. 771. Appellant concedes that a duty of due care is owed to persons on cross-paths in Pennsylvania (Appellant's Brief, pp. 15-21). The Pennsylvania Courts in the above cases reached this conclusion without drawing a distinction between cross-paths and parallel paths.

Whereas, in its brief in support of its petition for certiorari and also before the Circuit Court of Appeals, appellant gave the impression that the *Falchetti* case was based upon a long line of authority, this position is now abandoned by appellant, who is unable to cite any holding supporting the *Falchetti* case. This is extremely significant, for the Court in deciding the *Falchetti* case stated that it did so by virtue of precedent. Said the Court (*Falchetti* v. *Penn. R. R.*, 307 Pa. 203, 206):

> "* * * And moreover as the Conn. and Kolich cases show, an alleged permissive way parallel with defendant's tracks, and on its right of way, as distinguished from a permissive crossing over them is not recognized in this State * * *.
>
> "We do not deem it necessary to review the authorities cited by either litigant as showing, or tending to show, that a long continued use of a well defined path on the right of way of the defendant railroad company may or may not be considered as evidencing a permission to continue to use it. So far, if at all, as they tend to sustain, the right to continue such use, they must be considered as overruled by the Conn. and Kolich cases."

But appellant now concedes that the only support that can be found in the *Kolich* case, *supra*, is *dictum* (Appellant's Brief, p. 20), and makes no attempt to show that the holding in the *Conn* case in any way supports the *Falchetti* case, although the *Conn* case is commented on at length in appellant's brief (pp. 18, 19). For the convenience of this Court the *Conn* and *Kolich* cases are briefly set forth:

Conn v. *Penn. R. R.*, 288 Pa. 494, 136 A. 779. Plaintiff, infant, was injured while walking under a bridge and parallel to defendant's tracks. Plaintiff relied on the existence of a beaten path under the bridge, saying that it was used frequently by other boys. Held: *No beaten path was established.* Page 502: "A permissive way is a license to pass over the property of another; it may be either express or implied, but must, however, be restricted to a well-defined location and especially in the case of an implied public permission must be frequently, notoriously and continuously used by the public, to raise the inference of acquiescence on the part of the landowner in such use." Page 508: "The testimony does not show that there was ever any regularity or continuity in the trips of the boys under the bridge." Judgment for plaintiff reversed.

Kolich v. *Monongahela Ry. Co.*, 303 Pa. 463, 154 A. 705. Plaintiff injured while crossing defendant's tracks. The case rests solely on the contributory negligence of plaintiff. The Court held: "The jury's finding that this was a permissive crossing * * * had ample evidence to support it, as had also their finding that defendant was guilty of negligence in giving no warning of the approach of its train thereto. This leaves open only the question of plaintiff's contributory negligence, which we think was clearly established" (p. 467). Judgment for plaintiff reversed.

It thus appears that the *Conn* and *Kolich* cases, the sole authority cited by the Pennsylvania Court in the *Falchetti* case to support its holding, have nothing whatever to do with the proposition of law propounded by the Court in that case. In the *Conn* case no beaten path was proved. In the *Kolich* case the accident happened on a cross-path and the sole issue was plaintiff's contributory negligence.

The same may be said of *Tiers* v. *Penn. R. R.*, 292 Pa. 522, 141 A. 487, the single case cited by appellant as "leading up to the Falchetti decision" (Appellant's Brief, p. 19). That was a crossing case, plaintiff was injured at a crossing, and, of course, in the quotation set forth in appellant's brief, page 19, the Court talks only about crossings. The facts

and holding are as follows: Plaintiff, injured while crossing railroad, at a place where no path existed. The Court stated, in reversing a verdict for the plaintiff (p. 527): "If the evidence established a definite permissive point of crossing and while traversing such path plaintiff was injured a recovery might be had. That was the situation presented to the Court in Steele v. Lake Shore Ry. Co., 238 Pa. 295, 86 A. 201, relied on by appellee. There the regular walk was obstructed and plaintiff followed a well defined beaten way along * * * and over the tracks at a point beyond * * * but no such facts appear here * * * There is no evidence that there was any defined passageway at or near the place mentioned."

Nor has any case ever followed the *Falchetti* case. Appellant concedes, page 20, that no subsequent decision in Pennsylvania has involved a longitudinal pathway. It can be seen from a reading of appellant's brief that three later cases cited therein involving use of railroad property did not even involve beaten paths. *Koontz* v. *B. & O. R. Co.*, 309 Pa. 122, 163 A. 212 (Appellant's Brief, p. 20); *Lindsay* v. *Glen Alden Coal Co.*, 318 Pa. 133, 177 A. 751 (Appellant's Brief, p. 21); *Noonan* v. *Penn. R.*, 194 A. 282 (Appellant's Brief, p. 21).

Appellant can, therefore, rely on but a single Pennsylvania decision, clearly contrary to the weight and reasoning of other Pennsylvania decisions.

This Court has repeatedly held that, even where local questions of law are involved and Federal Courts would otherwise be under a duty, pursuant to the general rule, to follow State decisions, no such duty exists where there is but a single State decision expressing the State law or where the State law is unsettled.

The reasoning of these cases is that a single decision, particularly when recently made, is insufficient to establish a rule of property or action in a State. The same is true where State law is unsettled. The danger of disturbing vested rights and long-continued action in reliance thereon does not exist under such circumstances and, therefore, Federal Courts may follow their own independent judgment.

tiff in those cases to the train.* But, in doing so, appellant overlooks the point. If plaintiff had been struck by the side of the train, such discussions might be relevant. Plaintiff, however, was struck by an unusual and undesigned projection protruding from the side of the train, as were the plaintiffs in all the cases cited by the Circuit Court of Appeals.

Though a plaintiff may assume one danger, he is not barred from recovery if injured due to a danger created by defendant which he does not assume or expect.†

The case of *St. Louis Southwestern Ry.* v. *Balthrof*, 167 S. W. 246 (Tex.), is particularly relevant and is set forth here at length. In that case appellee's wife was injured on a longitudinal pathway which ran parallel to defendant's tracks at a distance of 3 feet. There was a nearer and safer way than the path chosen by appellee's wife. When several cars had passed her, and as she was proceeding on her way with a bucket of milk in her hand, she was struck a "blasting lick," as she puts it, on the right side, the one next the train, by some object from the cars. She testified she was making her way carefully without excitement, as she had done many times before, and did not know what struck her before losing consciousness. A piece of scantling, used in packing freight, was found near her. In affirming a verdict for plaintiff, the Court held (p. 249):

> "It may be conceded that one of the inherent risks or dangers of the use of the pathway appellee's wife

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* The cases cited were (*Sullivan* v. *Vicksburg, S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586) where the plaintiff was within fourteen inches of a moving train; (*Texas & Pacific* v. *Green*, 291 S. W. 929, aff'd 299 S. W. 639) where plaintiff was about two or three feet from a moving train; (*Chesapeake & O. R.* v. *Davis*, 22 Ky. L. Rep. 748, 58 S. W. 698) where plaintiff was about two and a half feet to three feet from a moving train; (*Pruitt* v. *Sou. R.*, 167 N. C. 246, 83 S. E. 350) where plaintiff was three or four feet from a moving train; (*Schultz* v. *Erie R.*, 46 Fed. [2d] 485) where plaintiff was within five feet from a moving train. In the second and fourth cases cited in this footnote it was dark when the accident occurred.

† *American Inst. Restatement Law of Torts*, Sec. 468; *Smithwick* v. *Hall & Upson*, 59 Conn. 261, 21 Atl. 924; *Passenger Ry. Co.* v. *Boudrou*, 92 Pa. 475, 37 Am. Rep. 707; *Webster* v. *Rome etc. Ry. Co.*, 115 N. Y. 112, 21 N. E. 725; *N. Y., L. E. etc. Ry. Co.* v. *Ball*, 53 N. J. L. 283, 21 Atl. 725; *Wagner* v. *Mo. & Pac. Ry. Co.*, 97 Mo. 512, 10 S. W. 486; *Berry* v. *Sugar Notch Borough*, 191 Pa. 345, 43 Atl. 240; *Sullivan* v. *Vicksburg S. & P. R. Co.*, 39 La. Ann. 800, 2 So. 586.

was using was that trains would pass in close proximity to the traveler, and that conceivable dangers and risks were imminent, but it is not at all inconsistent with such probability to say that the rule none the less contemplates the exercise of ordinary care to prevent the occurrence shown under the facts in the present case and as is illustrated in St. Louis S. W. Ry. Co. of Tex. v. Wilcox, where we sustained the finding of the jury that appellant had not exercised ordinary care when it so loaded cross ties on one of its cars that one protruded from the car and struck and injured appellee, a licensee upon the company's right of way. Accordingly we conclude that appellee's wife was not guilty of contributory negligence, since her injuries did not result from the inherent or usual and ordinary dangers of the pathway she was travelling but from the active negligence of appellant, independent of any contributing cause afforded either by the pathway, the tracks it paralleled, or the train which ran over the tracks, or appellee's wife."

The Circuit Court of Appeals was aided in reaching its conclusion that the issue of plaintiff's negligence was properly left to the jury by similar reasoning when it stated (p. 396):

"* * * But we cannot say that this particular danger was likely, in view of the testimony of the train checkers that seldom if ever had they known a door to swing open. Nor can we say, in view of the cases, that the possibility of being hit by some unusual object projecting from the side of a train is one that ought to be foreseen and enough to charge the plaintiff with contributory negligence as a matter of law, if he remains within reach of it."

And further (at p. 397):

"He (plaintiff) is not, however, obliged to anticipate unusual projections from the side of the cars and from the jury's verdict we must take it that he was injured by a projecting door. We do not think it was error to leave the issue of contributory negligence to the jury."

Appellant criticizes the following statement in the opinion of the Circuit Court of Appeals (p. 396):

> "To us it would seem imprudent to walk or even stand in the dark within a foot of a train moving at 10 miles an hour; but the fact that recoveries have been allowed under closely similar circumstances in the cases above cited *indicates that fair minded men may hold a different view. This is enough to preclude taking the issue from the jury.*" (Citing cases.) (Writer's emphasis.)

The italicized portions clearly indicate that the Circuit Court of Appeals applied the correct test as recognized by this Court (*Texas & Pacific Ry. Co.* v. *Harvey*, 228 U. S. 319).

Petitioner raises the objection that the Circuit Court of Appeals should not have looked to the decisions of other Courts in order to determine whether this plaintiff was guilty of contributory negligence. Unless we are to assume that other verdicts were not rendered by fair-minded men and passed upon by fair-minded jurists, and unless we are to abolish the entire system of precedent upon which our judicial foundation is constructed, the petitioner's argument is untenable.

The American Law Institute Restatement of the Law of Torts, at Section 285, Topic 3, recognizes that the conduct of a plaintiff may be defined by a decision, or series of decisions, in closely similar cases and that such decisions are controlling.

It will be noted that the portion of the opinion of the Circuit Court of Appeals which is criticized by the appellant was not the sole basis for that Court's conclusion, that the issue of plaintiff's negligence was properly left for the jury. Appellant's criticism, therefore, is purely verbal.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

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ERRATUM

In *Taylor* v. *Del. etc. Canal Co.*, 113 Pa. 162, 8 A. 43, cited herein at page 20, the facts are correctly stated. The holding is likewise correctly represented but through inadvertence a quotation from argument of counsel, rather than from the opinion, is set forth. A portion of the opinion which in substance is the same as the erroneous quotation is as follows (p. 175):

> "* * * and where it is shown, as was done in this case, that the footpath across the company's land had been habitually used by the public for many years without objection, it is for the jury to say whether the company had not acquiesced in such use.
>
> "While such use does not convert the company's right of way into a public highway, it certainly does relieve persons passing on the same from being treated as trespassers on the company's premises; and there is a manifest distinction between the degree of care which a railroad company is bound to exercise toward mere trespassers and those who may be using the right of way by tacit or implied permission of the company.
>
> "In the case of such long continued use by the public, the company and its employees are charged with notice of the fact, and therefore cannot with impunity neglect precautions to prevent dangers to persons thus using the same."

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1937.

Erie Railroad Company, Petitioner, *vs.* Harry J. Tompkins.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson*[1] shall now be disapproved.

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State. He claimed that the accident occurred through negligence in the operation, or maintenance, of the train; that he was rightfully on the premises as licensee because on a commonly used beaten foot-path which ran for a short distance alongside the tracks; and that he was struck by something which looked like a door projecting from one of the moving cars. To enforce that claim he brought an action in the federal court for southern New York, which had jurisdiction because the company is a corporation of that State. It denied liability; and the case was tried by a jury.

The Erie insisted that its duty to Tompkins was no greater than that owed to a trespasser. It contended, among other things, that its duty to Tompkins, and hence its liability, should be determined

[1] 16 Pet. 1 (1842). Leading cases applying the doctrine are collected in Black & White Taxicab, etc. Co. v. Brown & Yellow Taxicab, etc. Co., 276 U. S. 518, 530, 531. Dissent from its application or extension was expressed as early as 1845 by Mr. Justice McKinley (and Mr. Chief Justice Taney) in Lane v. Vick, 3 How. 464, 477. Dissenting opinions were also written by Mr. Justice Daniel in Rowan v. Runnels, 5 How. 134, 140; by Mr. Justice Nelson in Williamson v. Berry, 8 How. 495, 550, 558; by Mr. Justice Campbell in Pease v. Peck, 18 How. 595, 599, 600; and by Mr. Justice Miller in Gelpcke v. City of Dubuque, 1 Wall. 175, 207, and Butz v. City of Muscatine, 8 Wall. 575, 585. Vigorous attack upon the entire doctrine was made by Mr. Justice Field in Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368, 390, and by Mr. Justice Holmes in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370, and in the Taxicab case, 276 U. S. at 532.

in accordance with the Pennsylvania law; that under the law of Pennsylvania, as declared by its highest court, persons who use pathways along the railroad right of way—that is a longitudinal pathway as distinguished from a crossing—are to be deemed trespassers; and that the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful. Tompkins denied that any such rule had been established by the decisions of the Pennsylvania courts; and contended that, since there was no statute of the State on the subject, the railroad's duty and liability is to be determined in federal courts as a matter of general law.

The trial judge refused to rule that the applicable law precluded recovery. The jury brought in a verdict of $30,000; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, which held (90 F. (2d) 603, 604) that it was unnecessary to consider whether the law of Pennsylvania was as contended, because the question was one not of local, but of general, law and that

"upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law. . . . Where the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care in the operation of its trains. . . . It is likewise generally recognized law that a jury may find that negligence exists toward a pedestrian using a permissive path on the railroad right of way if he is hit by some object projecting from the side of the train."

The Erie had contended that application of the Pennsylvania rule was required, among other things, by Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C. Sec. 725, which provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari. 302 U. S. —.

First. *Swift* v. *Tyson*, 16 Pet. 1, 18, held that federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court; that they are free to exercise an independent judgment as to what the common law of the State is—or should be; and that, as there stated by Mr. Justice Story:

"the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us, that the section did apply, or was intended to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

The Court in applying the rule of Section 34 to equity cases, in *Mason* v. *United States*, 260 U. S. 545, 559, said: "The statute, however, is merely declarative of the rule which would exist in the absence of the statute."[2] The federal courts assumed, in the broad field of "general law", the power to declare rules of decision which Congress was confessedly without power to enact as statutes. Doubt was repeatedly expressed as to the correctness of the construction given Section 34,[3] and as to the soundness of the rule which it intro-

[2] In Hawkins v. Barney's Lessee, 5 Pet. 457, 464, it was stated that § 34 "has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." See also Bank of Hamilton v. Dudley's Lessee, 2 Pet. 492, 525. Compare Jackson v. Chew, 12 Wheat. 153, 162, 168; Livingston v. Moore, 7 Pet. 469, 542.

[3] Pepper, The Border Land of Federal and State Decisions (1889) 57; Gray, The Nature and Sources of Law (1909 ed.) §§ 533-34; Trickett, Non-Federal Law Administered in Federal Courts (1906) 40 Am. L. Rev. 819, 821-24.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1937.

Erie Railroad Company, Petitioner, vs. Harry J. Tompkins. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Butler.

The case presented by the evidence is a simple one. Plaintiff was severely injured in Pennsylvania. While walking on defendant's right of way along a much-used path at the end of the cross ties of its main track, he came into collision with an open door swinging from the side of a car in a train going in the opposite direction. Having been warned by whistle and headlight, he saw the locomotive approaching and had time and space enough to step aside and so avoid danger. To justify his failure to get out of the way, he says that upon many other occasions he had safely walked there while trains passed.

Invoking jurisdiction on the ground of diversity of citizenship, plaintiff, a citizen and resident of Pennsylvania, brought this suit to recover damages against defendant, a New York corporation, in the federal court for the southern district of that State. The issues were whether negligence of defendant was a proximate cause of his injuries and whether negligence of plaintiff contributed. He claimed that, by hauling the car with the open door, defendant violated a duty to him. The defendant insisted that it violated no duty and that plaintiff's injuries were caused by his own negligence. The jury gave him a verdict on which the trial court entered judgment; the circuit court of appeals affirmed. 90 F. (2d) 603.

Defendant maintained, citing *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, and *Koontz* v. *B. & O. R. Co.*, 309 Pa. 122, that the only duty owed plaintiff was to refrain from willfully or wantonly injuring him; it argued that the courts of Pennsylvania had so ruled with respect to persons using a customary longitudinal

path, as distinguished from one crossing the track. The plaintiff insisted that the Pennsylvania decisions did not establish the rule for which the defendant contended. Upon that issue the circuit court of appeals said (p. 604): "We need not go into this matter since the defendant concedes that the great weight of authority in other states is to the contrary. This concession is fatal to its contention, for upon questions of general law the federal courts are free, in absence of a local statute, to exercise their independent judgment as to what the law is; and it is well settled that the question of the responsibility of a railroad for injuries caused by its servants is one of general law." Upon that basis the court held the evidence sufficient to sustain a finding that plaintiff's injuries were caused by the negligence of defendant. It also held the question of contributory negligence one for the jury.

Defendant's petition for writ of certiorari presented two questions: Whether its duty toward plaintiff should have been determined in accordance with the law as found by the highest court of Pennsylvania, and whether the evidence conclusively showed plaintiff guilty of contributory negligence. Plaintiff contends that, as always heretofore held by this Court, the issues of negligence and contributory negligence are to be determined by general law against which local decisions may not be held conclusive; that defendant relies on a solitary Pennsylvania case of doubtful applicability and that, even if the decisions of the courts of that State were deemed controlling, the same result would have to be reached.

No constitutional question was suggested or argued below or here. And as a general rule, this Court will not consider any question not raised below and presented by the petition. *Olson* v. *United States*, 292 U. S. 246, 262. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494. *Gunning* v. *Cooley*, 281 U. S. 90, 98. Here it does not decide either of the questions presented but, changing the rule of decision in force since the foundation of the Government, remands the case to be adjudged according to a standard never before deemed permissible.

The opinion just announced states that "the question for decision is whether the oft-challenged doctrine of *Swift* v. *Tyson* [1842, 16 Pet. 1] shall now be disapproved."

That case involved the construction of the Judiciary Act of 1789, § 34: "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Expressing the view of all the members of the Court, Mr. Justice Story said (p. 18): "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed, and qualified by Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. *In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed,* that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. *It never has been supposed by us,* that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. ***And we have not now the slightest difficulty in holding,*** **that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles**

and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court, but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." (Italics added.)

The doctrine of that case has been followed by this Court in an unbroken line of decisions. So far as appears, it was not questioned until more than 50 years later, and then by a single judge.[1] *B. & O. Railroad* v. *Baugh*, 149 U. S. 368, 390. In that case, Mr. Justice Brewer, speaking for the Court, truly said (p. 373): "Whatever differences of opinion may have been expressed, they have not been on the question whether a matter of general law should be settled by the independent judgment of this court, rather than through an adherence to the decisions of the state courts, but upon the other question, whether a given matter is one of local or of general law."

And since that decision, the division of opinion in this Court has been of the same character as it was before. In 1910, Mr. Justice Holmes, speaking for himself and two other Justices, dissented from the holding that a court of the United States was bound to exercise its own independent judgment in the construction of a conveyance made before the state courts had rendered an authoritative decision as to its meaning and effect. *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349. But that dissent accepted (p. 371) as "settled" the doctrine of *Swift* v. *Tyson*, and insisted (p. 372) merely that the case under consideration was by nature and necessity peculiarly local.

Thereafter, as before, the doctrine was constantly applied.[2] In *B. & W. Taxi. Co.* v. *B. & Y. Taxi. Co.*, 276 U. S. 518, three judges

[1] Mr. Justice Field filed a dissenting opinion, several sentences of which are quoted in the decision just announced. The dissent failed to impress any of his associates. It assumes that adherence to § 34 as construed involves a supervision over legislative or judicial action of the states. There is no foundation for that suggestion. Clearly the dissent of the learned Justice rests upon misapprehension of the rule. He joined in applying the doctrine for more than a quarter of a century before his dissent. The reports do not disclose that he objected to it in any later case. Cf. Oakes v. Mase, 165 U. S. 363.

[2] In Salem Co. v. Manufacturers' Co., 264 U. S. 182, Mr. Justice Holmes and Mr. Justice Brandeis concurred (p. 200) in the judgment of the Court upon a question of general law on the ground that the rights of the parties were governed by state law.

dissented. The writer of the dissent, Mr. Justice Holmes, said, however (p. 535): "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields."

No more unqualified application of the doctrine can be found than in decisions of this Court speaking through Mr. Justice Holmes. *United Zinc Co.* v. *Britt*, 258 U. S. 268. *B. & O. R. R.* v. *Goodman*, 275 U. S. 66, 70. Without in the slightest departing from that doctrine, but implicitly applying it, the strictness of the rule laid down in the *Goodman* case was somewhat ameliorated by *Pokora* v. *Wabash Ry. Co.*, 292 U. S. 98.

Whenever possible, consistently with standards sustained by reason and authority constituting the general law, this Court has followed applicable decisions of state courts. *Mutual Life Co.* v. *Johnson*, 293 U. S. 335, 339. See *Burgess* v. *Seligman*, 107 U. S. 20, 34. *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, *supra*, 530. Unquestionably the determination of the issues of negligence and contributory negligence upon which decision of this case depends are questions of general law. *Hough* v. *Railway Co.*, 100 U. S. 213, 226. *Lake Shore, &c. Railway Co.* v. *Prentice*, 147 U. S. 101. *B. & O. Railroad* v. *Baugh*, *supra*. *Gardner* v. *Michigan Central Railroad*, 150 U. S. 349, 358. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 512. *B. & O. R. R.* v. *Goodman*, *supra*. *Pokora* v. *Wabash Ry. Co.*, *supra*.

While amendments to § 34 have from time to time been suggested, the section stands as originally enacted. Evidently Congress has intended throughout the years that the rule of decision as construed should continue to govern federal courts in trials at common law. The opinion just announced suggests that Mr. Warren's research has established that from the beginning this Court has erroneously construed § 34. But that author's "New Light on the History of the Federal Judiciary Act of 1789" does not purport to be authoritative and was intended to be no more than suggestive. The weight to be given to his discovery has never been discussed at this bar. Nor does the opinion indicate the ground disclosed by the research. In his dissenting opinion in the *Taxicab* case, Mr. Justice Holmes referred to Mr. Warren's work but failed to persuade the Court that "laws" as used in § 34 included varying and possibly ill-considered rulings by the courts of a State on ques-

duced.[4] But it was the more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the Court was erroneous; and that the purpose of the section was merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written.[5]

Criticism of the doctrine became widespread after the decision of *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U. S. 518.[6] There, Brown and Yellow, a Kentucky corporation owned by Kentuckians, and the Louisville and Nashville Railroad, also a Kentucky corporation, wished that the former should have the exclusive privilege of soliciting passenger and baggage transportation at the Bowling Green, Kentucky, railroad station; and that the Black and White, a competing Kentucky corporation, should be prevented from interfering with that privilege. Knowing that such a contract would be void under the common law of Kentucky, it was arranged that the Brown and Yellow reincorporate under the law of Tennessee, and that the contract with the railroad should be executed there. The suit was then brought by the Tennessee corporation in the federal court for western Kentucky to enjoin competition by the Black and White; an injunction issued by the district court was sustained by the

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[4] Street, Is There a General Commercial Law of the United States (1873) 21 Am. L. Reg. 473; Hornblower, Conflict between State and Federal Decisions (1880) 14 Am. L. Rev. 211; Meigs, Decisions of the Federal Courts on Questions of State Law (1882) 8 So. L. Rev. (n. s.) 452, (1911) 45 Am. L. Rev. 47; Heiskell, Conflict between Federal and State Decisions (1882) 16 Am. L. Rev. 743; Rand, Swift *v.* Tyson versus Gelpcke *v.* Dubuque (1895) 8 Harv. L. Rev. 328, 341-43; Mills, Should Federal Courts Ignore State Laws (1900) 34 Am. L. Rev. 51; Carpenter, Court Decisions and the Common Law (1917) 17 Col. L. Rev. 593, 602-03.

[5] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923) 37 Harv. L. Rev. 49, 51-52, 81-88, 108.

[6] Shelton, Concurrent Jurisdiction—Its Necessity and its Dangers (1928) 15 Va. L. Rev. 137; Frankfurter, Distribution of Judicial Power Between Federal and State Courts (1928) 13 Corn. L. Q. 499, 524-30; Johnson, State Law and the Federal Courts (1929) 17 Ky. L. J. 355; Fordham, The Federal Courts and the Construction of Uniform State Laws (1929) 7 N. C. L. Rev. 423; Dobie, Seven Implications of Swift *v.* Tyson (1930) 16 Va. L. Rev. 225; Dawson, Conflict of Decisions between State and Federal Courts in Kentucky, and the Remedy (1931) 20 Ky. L. J. 1; Campbell, Is Swift *v.* Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction (1932) 18 A. B. A. J. 809; Ball, Revision of Federal Diversity Jurisdiction (1933) 28 Ill. L. Rev. 356, 362-64; Fordham, Swift *v.* Tyson and the Construction of State Statutes (1935) 41 W. Va. L. Q. 131.

Court of Appeals; and this Court, citing many decisions in which the doctrine of *Swift* v. *Tyson* had been applied, affirmed the decree.

Second. Experience in applying the doctrine of *Swift* v. *Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity;[7] and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.[8]

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.[9] Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

The discrimination resulting became in practice far-reaching. This resulted in part from the broad province accorded to the so-

[7] Compare Mr. Justice Miller in Gelpcke *v.* City of Dubuque, 1 Wall. 175, 209. The conflicts listed in Holt, The Concurrent Jurisdiction of the Federal and State Courts (1888) 160 *et seq.* cover twenty-eight pages. See also Frankfurter, *supra* note 6, at 524-30; Dawson, *supra* note 6; Note, Aftermath of the Supreme Court's Stop, Look and Listen Rule (1930) 43 Harv. L. Rev. 926; cf. Yntema and Jaffin, Preliminary Analysis of Concurrent Jurisdiction (1931) 79 U. of Pa. L. Rev. 869, 881-86. Moreover, as pointed out by Judge Augustus N. Hand in Cole *v.* Pennsylvania R. Co., 43 F. (2d) 953, 956-57, decisions of this Court on common law questions are less likely than formerly to promote uniformity.

[8] Compare 2 Warren, The Supreme Court in United States History (rev. ed. 1935) 89: "Probably no decision of the Court has ever given rise to more uncertainty as to legal rights; and though doubtless intended to promote uniformity in the operation of business transactions, its chief effect has been to render it difficult for business men to know in advance to what particular topic the Court would apply the doctrine. . . ." The Federal Digest, through the 1937 volume, lists nearly 1000 decisions involving the distinction between questions of general and of local law.

[9] It was even possible for a non-resident plaintiff defeated on a point of law in the highest court of a State nevertheless to win out by taking a nonsuit and renewing the controversy in the federal court. Compare Gardner *v.* Michigan Cent. R. R., 150 U. S. 349; Harrison *v.* Foley, 206 Fed. 57 (C. C. A. 5); Interstate Realty & Inv. Co *v.* Bibb County, 293 Fed. 721 (C. C. A. 5); see Mills, *supra* note 4, at 52.

called "general law" as to which federal courts exercised an independent judgment.[10] In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State,[11] the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee;[12] the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State;[13] and the right to exemplary or punitive damages.[14] Furthermore, state decisions construing local deeds,[15] mineral conveyances,[16] and even devises of real estate[17] were disregarded.[18]

In part the discrimination resulted from the wide range of persons held entitled to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction. Through this juris-

[10] For a recent survey of the scope of the doctrine, see Sharp & Brennan, The Application of the Doctrine of Swift v. Tyson since 1900 (1929) 4 Ind. L. J. 367.

[11] Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U. S. 518; Rowan v. Runnels, 5 How. 134, 139; Boyce v. Tabb, 18 Wall. 546, 548; Johnson v. Chas. D. Norton Co., 159 Fed. 361 (C. C. A. 6); Keene Five Cent Sav. Bank v. Reid, 123 Fed. 221 (C. C. A. 8).

[12] Railroad Co. v. Lockwood, 17 Wall. 357, 367-68; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443; Eels v. St. Louis, K. & N. W. Ry., 52 Fed. 903 (C. C. S. D. Iowa); Fowler v. Pennsylvania R. R., 229 Fed. 373 (C. C. A. 2).

[13] Chicago City v. Robbins, 2 Black 418, 428. Compare Yates v. Milwaukee, 10 Wall. 497, 506-07; Yeates v. Illinois Cent. Ry., 137 Fed. 943 (C. C. N. D. Ill.); Curtis v. Cleveland, C. C. & St. L. Ry., 140 Fed. 777 (C. C. E. D. Ill.). See also Hough v. Railway Co., 100 U. S. 213, 226; Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368; Gardner v. Michigan Cent. R. R., 150 U. S. 349, 358; Beutler v. Grand Trunk Junction Ry., 224 U. S. 85; Baltimore & Ohio R. R. v. Goodman, 275 U. S. 66; Pokora v. Wabash Ry., 292 U. S. 98; Cole v. Pennsylvania R. R., 43 F. (2d) 953 (C. C. A. 2).

[14] Lake Shore & M. S. Ry. v. Prentice, 147 U. S. 101, 106; Norfolk & P. Traction Co. v. Miller, 174 Fed. 607 (C. C. A. 4); Greene v. Keithley, 86 F. (2d) 239 (C. C. A. 8).

[15] Foxcroft v. Mallet, 4 How. 353, 379; Midland Valley Ry. v. Sutter, 28 F. (2d) 163 (C. C. A. 8); Midland Valley Ry. v. Jarvis, 29 F. (2d) 539 (C. C. A. 8).

[16] Kuhn v. Fairmont Coal Co., 215 U. S. 349; Mid-Continent Petroleum Corp. v. Sauder, 67 F. (2d) 9, 12 (C. C. A. 10), reversed on other grounds, 292 U. S. 272.

[17] Lane v. Vick, 3 How. 464, 476; Barber v. Pittsburgh, F. W. & C. Ry., 166 U. S. 83, 99-100; Messinger v. Anderson, 171 Fed. 785, 791-792 (C. C. A. 6), reversed on other grounds, 225 U. S. 436; Knox & Lewis v. Alwood, 228 Fed. 753 (S. D. Ga.).

[18] Compare, also, Williamson v. Berry, 8 How. 495; Watson v. Tarpley, 18 How. 517; Gelpcke v. City of Dubuque, 1 Wall. 175.

diction individual citizens willing to remove from their own State and become citizens of another might avail themselves of the federal rule.[19] And, without even change of residence, a corporate citizen of the State could avail itself of the federal rule by re-incorporating under the laws of another state, as was done in the *Taxicab* case.

The injustice and confusion incident to the doctrine of *Swift* v. *Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.[20] Other legislative relief has been proposed.[21] If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.[22] But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a

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[19] See Chesver v. Wilson, 9 Wall. 108, 123; Robertson v. Carson, 19 Wall. 94, 106-07; Morris v. Gilmer, 129 U. S. 315, 328; Dickerman v. Northern Trust Co., 176 U. S. 181, 192; Williamson v. Osenton, 232 U. S. 619, 625.

[20] See, e. g., Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 937, S. 939, and S. 3243, 72d Cong., 1st Sess. (1932) 6-8; Hearing Before the House Committee on the Judiciary on H. R. 10594, H. R. 4526, and H. R. 11508, 72d Cong., 1st Sess., ser. 12 (1932) 97-104; Sen. Rep. No. 530, 72d Cong., 1st Sess. (1932) 4-6; Collier, A Plea Against Jurisdiction Because of Diversity (1913) 76 Cent. L. J. 263, 264, 266; Frankfurter, *supra* note 6; Ball, *supra* note 6; Warren, Corporations and Diversity of Citizenship (1933) 19 Va. L. Rev. 661, 686.

[21] Thus, bills which would abrogate the doctrine of Swift v. Tyson have been introduced. S. 4333, 70th Cong., 1st Sess.; S. 96, 71st Cong., 1st Sess.; H. R. 8094, 72d Cong., 1st Sess. See also Mills, *supra* note 4, at 68-69; Dobie, *supra* note 6, at 241; Frankfurter, *supra* note 6, at 530; Campbell, *supra* note 6, at 811. State statutes on conflicting questions of "general law" have also been suggested. See Heiskell, *supra* note 4, at 760; Dawson, *supra* note 6; Dobie, *supra* note 6, at 241.

[22] The doctrine has not been without defenders. See Eliot, The Common Law of the Federal Courts (1902) 36 Am. L. Rev. 498, 523-25; A. B. Parker, The Common Law Jurisdiction of the United States Courts (1907) 17 Yale L. J. 1; Schofield, Swift v. Tyson; Uniformity of Judge-Made State Law in State and Federal Courts (1910) 4 Ill. L. Rev. 533; Brown, The Jurisdiction of the Federal Courts Based on Diversity of Citizenship (1929) 78 U. of Pa. L. Rev. 179, 189-91; J. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It (1932) 18 A. B. A. J. 433, 438; Yntema, The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States (1933) 19 A. B. A. J. 71, 74-75; Beutel, Common Law Judicial Technique and the Law of Negotiable Instruments—Two Unfortunate Decisions (1934) 9 Tulane L. Rev. 64.

decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. As stated by Mr. Justice Field when protesting in *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, 401, against ignoring the Ohio common law of fellow servant liability:

"I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a State. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes.[22] The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute", that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":

"but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law

[22] Kuhn v. Fairmont Coal Co., 215 U. S. 349, 370-372; Black & White Taxicab, etc. Co. v. Brown & Yellow Taxicab, etc. Co., 276 U. S. 518, 532-36.

so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .
"the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."
Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." In disapproving that doctrine we do not hold unconstitutional Section 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.

Fourth. The defendant contended that by the common law of Pennslyvania as declared by its highest court in *Falchetti* v. *Pennsylvania R. Co.*, 307 Pa. 203, the only duty owed to the plaintiff was to refrain from wilful or wanton injury. The plaintiff denied that such is the Pennsylvania law.[24] In support of their respective contentions the parties discussed and cited many decisions of the Supreme Court of the State. The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold this was error, the judgment is reversed and the case remanded to it for further proceedings in conformity with our opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[24] Tompkins also contended that the alleged rule of the Falchetti case is not in any event applicable here because he was struck at the intersection of the longitudinal pathway and a transverse crossing. The court below found it unnecessary to consider this contention, and we leave the question open.

supposed omission of Congress to legislate as to the effect of decisions leaves federal courts free to interpret general law for themselves. I am not at all sure whether, in the absence of federal statutory direction, federal courts would be compelled to follow state decisions. There was sufficient doubt about the matter in 1789 to induce the first Congress to legislate. No former opinions of this Court have passed upon it. Mr. Justice Holmes evidently saw nothing "unconstitutional" which required the overruling of *Swift* v. *Tyson*, for he said in the very opinion quoted by the majority, "I should leave *Swift* v. *Tyson* undisturbed, as I indicated in *Kuhn* v. *Fairmont Coal Co.*, but I would not allow it to spread the assumed dominion into new fields." *B. & W. Taxi Co.* v. *B. & Y. Taxi Co.*, 276 U. S. 518, 535. If the opinion commits this Court to the position that the Congress is without power to declare what rules of substantive law shall govern the federal courts, that conclusion also seems questionable. The line between procedural and substantive law is hazy but no one doubts federal power over procedure. *Wayman* v. *Southard*, 10 Wheat. 1. The Judiciary Article and the "necessary and proper" clause of Article One may fully authorize legislation, such as this section of the Judiciary Act.

In this Court, *stare decisis*, in statutory construction, is a useful rule, not an inexorable command. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, dissent, p. 406, note 1. Compare *Read* v. *Bishop of Lincoln*, 1892 A. C. 644, 655; *London Street Tramways* v. *London County Council*, 1898 A. C. 375, 379. It seems preferable to overturn an established construction of an Act of Congress, rather than, in the circumstances of this case, to interpret the Constitution. Cf. *United States* v. *Delaware & Hudson*, 213 U. S. 366.

There is no occasion to discuss further the range or soundness of these few phrases of the opinion. It is sufficient now to call attention to them and express my own non-acquiescence.

tions of common law. See, e. g., *Swift* v. *Tyson*, *supra*, 16-17. It well may be that, if the Court should now call for argument of counsel on the basis of Mr. Warren's research, it would adhere to the construction it has always put upon § 34. Indeed, the opinion in this case so indicates. For it declares: "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so." This means that, so far as concerns the rule of decision now condemned, the Judiciary Act of 1789 passed to establish judicial courts to exert the judicial power of the United States, and especially § 34 of that Act as construed, is unconstitutional; that federal courts are now bound to follow decisions of the courts of the State in which the controversies arise; and that Congress is powerless otherwise to ordain. It is hard to foresee the consequences of the radical change so made. Our opinion in the *Taxicab* case cites numerous decisions of this Court which serve in part to indicate the field from which it is now intended forever to bar the federal courts. It extends to all matters of contracts and torts not positively governed by state enactments. Counsel searching for precedent and reasoning to disclose common-law principles on which to guide clients and conduct litigation are by this decision told that as to all of these questions the decisions of this Court and other federal courts are no longer anywhere authoritative.

This Court has often emphasized its reluctance to consider constitutional questions and that legislation will not be held invalid as repugnant to the fundamental law if the case may be decided upon any other ground. In view of grave consequences liable to result from erroneous exertion of its power to set aside legislation, the Court should move cautiously, seek assistance of counsel, act only after ample deliberation, show that the question is before the Court, that its decision cannot be avoided by construction of the statute assailed or otherwise, indicate precisely the principle or provision of the Constitution held to have been transgressed, and fully disclose the reasons and authorities found to warrant the conclusion of invalidity. These safeguards against the improvident use of the great power to invalidate legislation are so well-grounded and familiar that statement of reasons or citation of authority to sup-

port them is no longer necessary. But see e. g.: *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 553; *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 673; *Chicago, &c. Railway Co.* v. *Wellman*, 143 U. S. 339, 345; *Baker* v. *Grice*, 169 U. S. 284, 292; *Martin* v. *District of Columbia*, 205 U. S. 135, 140.

So far as appears, no litigant has ever challenged the power of Congress to establish the rule as construed. It has so long endured that its destruction now without appropriate deliberation cannot be justified. There is nothing in the opinion to suggest that consideration of any constitutional question is necessary to a decision of the case. By way of reasoning, it contains nothing that requires the conclusion reached. Admittedly, there is no authority to support that conclusion. Against the protest of those joining in this opinion, the Court declines to assign the case for reargument. It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it. Indeed, it would have been appropriate to give Congress opportunity to be heard before devesting it of power to prescribe rules of decision to be followed in the courts of the United States. See *Myers* v. *United States*, 272 U. S. 52, 176.

The course pursued by the Court in this case is repugnant to the Act of Congress of August 24, 1937, 50 Stat. 751. It declares: "That whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General. In any such case the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act. In any such suit or proceeding the United States shall, subject to the applicable provisions of law, have all the rights of a party and the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of such Act." That provision extends to this Court. §5. If defend-

ant had applied for and obtained the writ of certiorari upon the claim that, as now held, Congress has no power to prescribe the rule of decision, § 34 as construed, it would have been the duty of this Court to issue the prescribed certificate to the Attorney General in order that the United States might intervene and be heard on the constitutional question. Within the purpose of the statute and its true intent and meaning, the constitutionality of that measure has been "drawn in question". Congress intended to give the United States the right to be heard in every case involving constitutionality of an Act affecting the public interest. In view of the rule that, in the absence of challenge of constitutionality, statutes will not here be invalidated on that ground, the Act of August 24, 1937 extends to cases where constitutionality is first "drawn in question" by the Court. No extraordinary or unusual action by the Court after submission of the cause should be permitted to frustrate the wholesome purpose of that Act. The duty it imposes ought here to be willingly assumed. If it were doubtful whether this case is within the scope of the Act, the Court should give the United States opportunity to intervene and, if so advised, to present argument on the constitutional question, for undoubtedly it is one of great public importance. That would be to construe the Act according to its meaning.

The Court's opinion in its first sentence defines the question to be whether the doctrine of *Swift* v. *Tyson* shall now be disapproved; it recites (third page) that Congress is without power to prescribe rules of decision that have been followed by federal courts as a result of the construction of § 34 in *Swift* v. *Tyson* and since; after discussion, it declares (seventh page) that "the unconstitutionality of the course pursued [meaning the rule of decision resulting from that construction] compels" abandonment of the doctrine so long applied; and then near the end of the last page the Court states that it does not hold § 34 unconstitutional, but merely that, in applying the doctrine of *Swift* v. *Tyson* construing it, this Court and the lower courts have invaded rights which are reserved by the Constitution to the several States. But, plainly through the form of words employed, the substance of the decision appears; it strikes down as unconstitutional § 34 as construed by our decisions; it divests the Congress of power to prescribe rules to be followed by federal courts when deciding ques-

tions of general law. In that broad field it compels this and the lower federal courts to follow decisions of the courts of a particular State.

I am of opinion that the constitutional validity of the rule need not be considered, because under the law, as found by the courts of Pennsylvania and generally throughout the country, it is plain that the evidence required a finding that plaintiff was guilty of negligence that contributed to cause his injuries and that the judgment below should be reversed upon that ground.

Mr. Justice McReynolds concurs in this opinion.

SUPREME COURT OF THE UNITED STATES.

No. 367.—October Term, 1937.

Erie Railroad Company, Petitioner, *vs.* Harry J. Tompkins. } On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 25, 1938.]

Mr. Justice Reed.

I concur in the conclusion reached in this case, in the disapproval of the doctrine of *Swift* v. *Tyson,* and in the reasoning of the majority opinion except in so far as it relies upon the unconstitutionality of the "course pursued" by the federal courts.

The "doctrine of *Swift* v. *Tyson,*" as I understand it, is that the words "the laws," as used in Section 34, line one, of the Federal Judiciary Act of September 24, 1789, do not include in their meaning "the decisions of the local tribunals." Mr. Justice Story, in deciding that point, said (16 Pet. 19):

"Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

To decide the case now before us and to "disapprove" the doctrine of *Swift* v. *Tyson* requires only that we say that the words "the laws" include in their meaning the decisions of the local tribunals. As the majority opinion shows, by its reference to Mr. Warren's researches and the first quotation from Mr. Justice Holmes, that this Court is now of the view that "laws" includes "decisions," it is unnecessary to go further and declare that the "course pursued" was "unconstitutional," instead of merely erroneous.

The "unconstitutional" course referred to in the majority opinion is apparently the ruling in *Swift* v. *Tyson* that the